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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

JESSE BENJAMIN STONER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND TO THE SUPREME COURT OF THE STATE OF ALABAMA

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QUESTIONS PRESENTED

I.

Whether the due process rights of petitioner under the Fourteenth Amendment to the United States Constitution were violated by the State of Alabama's highly prejudicial delay of over nineteen years before indicting him for his alleged crime - a delay for which the State can give no reason - substantially prejudicing petitioner by delaying his indictment until after the death of four of his witnesses and the loss of documents which would have proven his innocence.

II

Whether petitioner's rights to equal protection were violated when the Alabama Court of Criminal Appeals ruled that the three year statute of limitations did not bar his prosecution when he was indicted in 1977 for a crime he allegedly committed in 1958, but impliedly held that the prosecution of a person who committed the same crime since this Court outlawed the Alabama death penalty in 1972 would be barred by that statute of limitations.

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Petitioner Jesse Benjamin Stoner respectfully prays that a writ of certiorari issue to the Alabama Court of Criminal Appeals in order that this honorable Court might review the decision in this case rendered in the court below.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal

Appeals (Appendix, infra) is reported at **STONER v. STATE**, 418 So.2d 171 (Ala.Crim.App . 1982).

When the Supreme Court of Alabama denied certiorari on August 13, 1982, there was no majority opinion rendered and only one dissenting opinion by Justice Faulkner of that court. Said dissent (Appendix, infra) is reported at **EX PARTE STONER**, 418 So.2d 184 (Ala. 1982.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 17 (b) and (c) of the Rules of this Court. On October 1, 1982 the Honorable Justice Lewis F. Powell, Associate Justice of the United States Supreme Court, signed an order extending time to file petition for writ of certiorari up to and including November 11, 1982 (Appendix, infra).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, the Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Proceedings Below

The indictment against petitioner charged that he "set off or exploded dynamite or other explosives in, under or dangerously near to" an inhabited dwelling. No one was killed or injured on account of this explosion. Your petitioner is the only person to have ever been prosecuted in connection with this incident. After a jury trial in the Circuit Court of Jefferson County, Alabama, he was convicted and sentenced to ten years in prison.

The indictment against petitioner was returned on the 26th day of September, 1977, over nineteen years after the date of the offense which occurred on the 29th day of June, 1958. (Tr. 93) The investigation of petitioner's possible involvement terminated in July of 1958. (Tr. 274) During that period of 19¼ years, no new evidence pertaining to petitioner or this case was ever brought forward.

Prior to trial the trial court overruled petitioner's plea in bar based on the prejudicial pre-indictment delay of 19¼ years that violated the due process rights of petitioner.

The trial court also erred in overruling petitioner's plea to the statute of limitations.

After conviction the trial court released petitioner on a $20,000.00 bail bond and suspended his sentence pending appeal. (Tr. 455) Petitioner then filed a motion for new trial or judgment of acquittal (Tr. 514) and later supplemented that motion. (Tr. 519) The motion for a new trial as supplemented was overruled by the trial court. (Tr. 521 & 522)

On July 7, 1981 petitioner filed his brief and argument in the Alabama Court of Criminal Appeals and on

April 20, 1982 that appellate court affirmed petitioner's judgment of conviction. Said Court rejected all of petitioner's grounds for reversal based on grounds of the Fourteenth Amendment. Since that court is Alabama's highest court of appeals by right of law in criminal cases, petitioner timely filed his application for rehearing which was denied on May 18, 1982.

On May 28, 1982 petitioner filed a petition for writ of certiorari with the Supreme Court of Alabama which was denied on August 13, 1982. There was no majority opinion, but Justice Faulkner wrote a dissenting opinion in favor of petitioner (Appendix, infra).

On August 20, 1982 the Alabama Court of Criminal Appeals granted a stay of sixty (60) days from August 13, 1982 to allow petitioner to file a petition for writ of certiorari in the United Stated Supreme Court (Appendix, infra). On October 1, 1982 Honorable Lewis F. Powell, Jr., Associate Justice of this honorable Court issued an order extending time to file petition for writ of certiorari up to and including November 11, 1982 (Appendix, infra).

Statement of Facts

The State's main witness, Lt. Tom Cook, retired, testified that he met with petitioner on June 21, 1958 in Birmingham, Alabama along with another police detective, Captain Pattie of the Birmingham Police Department, now deceased, and an informer, Hugh Morris, in a Studebaker owned by Mr. Morris. (Tr. 249-258) Sgt. Cook testified that unidentified people left it up to him and Captain Pattie to select a responsible person to arrange for the bombing of Rev. Shuttlesworth's church, but they did not have the money to pay for a bombing. Lt.

Cook said that he hoped for a total destruction of the church which would persuade Rev. Shuttlesworth to leave Birmingham and go up "north where he belonged." (Tr. 257)

Cook and Pattie talked about paying petitioner $2,000.^00, but there was no meeting of the minds and no money was ever paid to petitioner, according to the testimony of Lt. Cook. (Tr. 227) An attempt to bomb the church was made a week later on June 29, 1958. On July 12 the same four individuals met again at the same place in the previously mentioned car. This second meeting on July 12, 1958 was observed by other Birmingham police officers, F.B.I. agents and by the late Judge E.C. Watson of the Circuit Court of Jefferson County, who was an Assistant Solicitor in 1958. No arrest was made.

Lt. (then Sgt.) Cook testified that the last fruitful investigation that had been conducted in the case was that second meeting with petitioner on July 12, 1958. (Tr. 228-277) Sgt. Cook testified that no arrest was made until September of 1977, despite the general arrest powers of all officers involved. (Tr. 275) All of the conversations Lt. Cook had with petitioner were in regard to bombing Rev. Shuttlesworth's church. Yet, petitioner was not indicted for bombing that church, but for setting off explosives near an inhabited dwelling in the proximity of the church.

Rev. Fred Shuttlesworth, who was pastor of the church at the time, testified that during 1958 Birmingham police officers frequently attended meetings in his church and that he protested to no avail and eventually had a lawsuit about it. (Tr. 286) He said the lawsuit did not end such harassment by the police and the police would record the meetings of his movement electronically and by sitting in the meetings taking notes. (Tr. 286 & 287)

Rev. Shuttlesworth testified that the Birmingham Police persecuted his civil rights movement when it was meeting at his church and at other places. (Tr. 286 & 287) He left Birmingham in August of 1961 and moved back to Cincinnati where he lived at the time of the trial. (Tr. 90 & 91) That was Lt. Cook's objective as mentioned above. (Tr. 257).

Petitioner testified that he met with Lt. Cook, Captain Pattie and Mr. Hugh Morris because he was going to expose them for attempting to entrap people and that he made public speeches exposing them for attempting to entrap him. (Tr. 340, et seq) He nevertheless emphatically denied any involvement whatsoever in said crime.

No one identified petitioner at the scene of the explosion on the day that it happened. Petitioner was not seen at the scene of the explosion and the State conceded that he did not personally place an explosive there. Witnesses did not claim to see anybody place the explosive and this case rests upon circumstantial evidence.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Alabama Court of Criminal Appeals in affirming the trial court's overruling petitioner's plea in bar and motion for new trial based on the highly prejudicial pre-indictment delay of over nineteen years after the alleged criminal act is in violation of the due process rights of petitioner under the Fourteenth Amendment and conflicts with this Court's ruling in **UNITED STATES v. MARION**, 404 U.S. 307 (1971); **UNITED STATES v. LOVASCO**, 431 U.S. 783 (1977) and **UNITED STATES v. VALENZUELA-BERNAL**, 102 S. Ct. 3440 (1982). The decision is also in conflict with United

States Courts of Appeal in **UNITED STATES v. CORDOVA**, 537 F.2d 1073 (1976); **UNITED STATES v. RICE**, 550 F.2d 1364 (1977); **UNITED STATES v. BRAND**, 556 F.2d 1312 (1977); and especially in conflict with the decision in the United States Court of Appeals for the Fifth Circuit in **UNITED STATES v. TOWNLEY**, 665 F.2d 579 (1982). It is in further conflict with the Supreme Court of West Virginia in **STATE v. HEY**, 269 S.E. 2nd 394 (1980); and the Supreme Court of Illinois in **PEOPLE v. LAWSON**, 367 N.E. 2nd 1244, 1248 (1977). The opinion of the Alabama Court of Criminal Appeals follows a rule that is in opposition to the many courts which have ruled that a long, unexplained pre-indictment delay shifts the burden once petitioner shows that he has been prejudiced by the delay. **UNITED STATES v. TOWNLEY**, supra, **STATE v. HEY**, supra and other jurisdictions disagree with the Alabama courts and have ruled that where there is a long unexplained pre-indictment delay, prejudice is presumed and the burden then rests on the prosecution to show that the delay was justified, which the State failed to do in your petitioner's case. Rule 17 (b) of the Rules of this Court.

Many of the facets and aspects of prejudicial pre-indictment delay in violation of due process have been ruled on by various courts in ways which favor petitioner's position. The conflict now needs to be settled by this Court in accordance with Rule 17 (c) of the Rules of this Court.

Should the unexplained 19¼ year delay in instituting prosecution in this case be considered substantially equivalent in legal import to a delay occasioned by the prosecution's desire to obtain a tactical advantage over the accused? This instant case at bar breaks all records

in terms of time as shown by all of the other cases which have dealt with pre-indictment delay.

The record demonstrates that the offense charged in the indictment occurred in the early morning hours of June 29, 1958 in Birmingham. (Tr. 93) It is undisputed that the indictment on which the conviction is based was returned by the Jefferson County grand jury on September 26, 1977. (Tr. 464) The State's two prosecuting attorneys conceded at trial that there was no reason they knew of why the case was not earlier brought to the attention of the grand jury, nor why Alabama and Jefferson County prosecutors and law enforcement officers did not earlier endeavor to resolve the matter of prosecuting petitioner. [Testimony of Honorable Burton Dunn, Assistant District Attorney, Jefferson County, Alabama (Tr. 418-420) and testimony of John A. Yung, IV, Assistant Attorney General. (Tr. 421-426)]

Likewise, it was conceded that petitioner had done nothing to impede or hinder the procurement of the indictment. It is likewise conceded by the State that there was no new evidence developed and that there were no new leads pursued in the ensuing 19¼ years up to and including the day of indictment. (Tr. 419, 420, 423) The State virtually admitted and the Trial Court apparently found as a matter of fact that the reason for the delay was that the State did not believe that it could secure a conviction at an earlier date, but did believe that they would have a better chance to do so almost twenty years after the alleged crime. (Tr. 459)

In considering contentions of prejudicial delay in violation of due process, this Court has implicitly held that the reasons which the prosecution assigns for such a delay must be weighed against any harm that inures to

the accused in presenting his defense. **United States v. Lovacso**, Supra; **United States v. Marion**, supra. This Court has never before had an opportunity to review a case where absolutely no reason was advanced to explain a pre-indictment delay as long as in the present case. Even the decision of the Alabama Court of Criminal Appeals acknowledges that the delay herein is unexplained.

Lower federal and state appellate courts faced with the same issue presented in this case have held that an unexplained, extensive delay in instituting prosecution can be deemed to be the legal equivalent of a delay occasioned by a design to obtain a tactical advantage over an accused. **UNITED STATES v. BARKET**, 532 F. 2nd 189 (8th Cir., 1975); **United States v. Townley**, supra, **United States v. Richburg**, 478 F. Supp. 535 (M.D. Tenn. 1979); **State v. Hey**, supra. In the case of **State v. Hey**, the Supreme Court of Appeals of the State of West Virginia said that an unexplained delay of eleven years in beginning a criminal prosecution by seeking an indictment gave rise to a presumption of prejudice to the accused and obliged the State to justify the delay. The decision of that court of last resort is in obvious conflict with the Alabama appellate courts..

Contrary to the decisions of the Alabama Court of Criminal Appeals, the courts of many jurisdictions have ruled that where there is a long unexplained delay, prejudice is presumed and the burden then rests on the prosecution to show that the delay was justified. The State of Alabama offered no excuse for its 19¼ year delay and it failed in its obligation to show a logical and legitimate reason consistent with due process requirements of the United States Constitution.

In **People v. Gulley**, (1980) 404 N.E. 2nd 1077, 83 Ill.

App. 3rd 1066, the Illinois Court of Appeals thought that a 51 month indictment delay was too long and adopted the language of People v. Lawson, supra, which said, "If the accused satisfies the trial court that he or she has been substantially prejudiced by the delay, then the burden shifts to the State to show the reasonableness, if not the necessity for the delay." That court went on to say, "The length of the delay here, 51 months, causes great suspicion and gives rise to a presumption that the delay was prejudicial." 404 N.E. 2nd 1077, 1080.

The long delay, over four times as long as in **Gulley**, gives rise to a presumption and should cause the burden to be on the prosecution to show the reasonableness of the delay, contrary to the holding of the Alabama Court of Criminal Appeals in the case at bar.

The Alabama Court of Criminal Appeals is in conflict with the decision of the United States Court of Appeals in **United States v. Townley**, supra, which approvingly quotes **United States v. Brand**, supra, in saying that a pre-indictment delay of 41 months was too long and would not automatically justify prejudice to an accused.

The reasoning of the foregoing cases is in accord with the obvious fact that the prosecution's intent in such circumstances can only be proven by the results it achieves since, few, if any, prosecuting attorneys would ever expressly admit to having a desire to prejudice an accused in the presentation of his defense by delaying prosecution for an inordinate period of time. In the absence of such inferences of intent, the task of a defendant such as the petitioner in proving a prosecutor's plan to gain a tactical advantage and to embarass a defendant in his defense will be almost insurmountable if not impossible. One cannot interrogate prosecuting

attorneys, law enforcement officers and other government officials involved in an accused's case as to their reason for not bringing charges over nineteen years earlier when such individuals may be dead or no longer able to remember the details of the case, or when their whereabouts may be unknown.

In this case the State gave no reason or excuse for its delay. When the Alabama Supreme Court denied certiorari, there was only one opinion, the dissenting opinion (Appendix, infra) by Justice Faulkner whose opinion stated,

> The Court of Criminal Appeals affirmed, and conceded that no explanation appears in the record justifying the 19 years' delay. It can be inferred that the 19 years' delay was for the State to gain a tactical gain over Stoner. In other words, wait long enough and a climate of conviction will emerge, whereas if Stoner had been tried within a reasonable time, chances were greatly in his favor that he would have been acquitted. The trial judge stated, "I would almost find that as a matter of fact for the reason of delay the State did not feel they could successfully prosecute in 1958."

It is clear that where the prosecution has delayed, as in the present case, so that the prosecution could gain some tactical advantage, the delay was prejudicial and the conviction should be reversed. **United States v. Marion**, supra; **United States v. Lovasco**, supra; and the way that those cases have been interpreted, **United States v. Cordova**, supra; **United States v. Rice**, supra; **United States v. Alderman**, 423 F. Supp. 847; **People v. Gulley**, supra; **State v. Hey**, supra, and others.

The unexplained pre-indictment delay of over nineteen years, longer than any other case on record, was palpably unjustified. That 19¼ year delay creates a presumption of prejudicial delay which violates petitioner's due process rights.

The ruling of the Alabama Court of Criminal Appeals additionally conflicts with **United States v. Mills**, 641 F. 2nd 785 (9th Circuit 1981) and with this Court's recent decision in **United States v. Valenzeula-Bernal**, supra. As specified by these two cases, petitioner made and submitted his own affidavits showing that four of his witnesses died before his indictment which in turn made a showing of what each would have testified to if still alive. In **United States v. Mills**, supra, the United States Court of Appeals for the Ninth Circuit said:

> Showing that witnesses have been lost or that evidence has become unavailable due to the delay suggests actual prejudice. But it is not enough to assert that potential witnesses have been lost. A defendent must identify the witnesses, relate the substance of their testimony, and efforts made to locate them.

The record shows that petitioner did all of the things required by the **Mills** case and also introduced properly authenticated death certificates that proved the death of his four deceased witnesses during the 19¼ year period of time between the day of the alleged crimes and the day of indictment.

This Court's decision in **Valenzuela-Bernal**, supra, said:

> In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompan-

> ied by reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense. Because in the latter situation the explanation of the materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney. 102 S.Ct. at page 3450.

Petitioner did verify with affidavits as to what the testimony of his deceased witnesses would have been and attested to the materiality of their testimony with the procedure and fashion required by **Valenzuela-Bernal**, supra. The decision of the Alabama Court of Criminal Appeals therefore conflicts with those two cases when it denounces petitioner's affidavits as "self-serving declarations" and as "rank hearsay" (Appendix, infra).

Even though the prosecutors stated in the trial that they did not claim that petitioner personally set off the explosion, they nevertheless claimed that he got "his boys" to do it. Yet, they introduced no evidence whatsoever to identify such "boys" and introduced no witnesses who claimed they ever saw any such boys. There were no eye witnesses to testify that they saw anybody set off the explosion in this case of circumstantial evidence. There was no evidence to support their conjecture of a conspiracy. The indictment did not allege a conspiracy and named petitioner as sole defendant. Two of petitioner's witnesses would have been alibi witnesses who would have testified that he was in Georgia and not in Alabama at the time of the offense on June 29, 1958.

Petitioner submitted an authenticated death certificate showing that his landlady, Mrs. Hortez Johnson, had died on September 2, 1961 and an affidavit showing that she would have testified to facts proving that petitioner could not have been in Birmingham, Alabama at the time of the alleged bombing because he was in Dublin, Georgia on that critical date. By the same means, petitioner showed by affidavit and death certificate that Beverly Bernard Tanner, Jr. of Dublin, Georgia was with petitioner in Georgia at the time of the alleged offense in issue and that petitioner was not in Birmingham, Alabama. The death certificate introduced into evidence showed that Mr. Tanner died on February 10, 1977 which, of course, was prior to the date of indictment. Petitioner's affidavit also reflects that Mr. Tanner could have corroborated petitioner's testimony in other material aspects.

Another affidavit submitted by petitioner sets forth the probable testimony of Ralph Barron, another associate of his during the period when this crime occured. His testimony, had it been available to the defendant, could have possibly persuaded the jury to acquit. However, a properly authenticated death certificate tendered with the affidavit shows that Mr. Barron died on August 10, 1976.

An affidavit of particular importance submitted by petitioner was the one embodying the putative testimony of Mark Richard Bowling, III. His death certificate in evidence showed that he died on September 23, 1973. Bowling's testimony would have shown that petitioner knew that he was dealing with police agents when they initially discussed the bombing. This testimony would have obviously rendered it highly unlikely that petitioner ever intended actually to participate in any such crime.

Bowling could have additionally testified that after the crime had taken place another person, Hugh Morris, admitted to Bowling that he was the person who ordered the church to be bombed by using a police informer. The exculpatory value of such testimony to the petitioner is self-evident.

If those four dead witnesses had been alive and testified for petitioner, their testimony could easily have presuaded the jury of petitioner's innocence or could have at least created a reasonable doubt as to his guilt. All of their testimony would have been admissible, material, relevant and probative as to the issues in the case. Contrary to the decision of the lower court, Mr. Stallworth's testimony would not have taken the place of the testimony of any of the four deceased witnesses. For instance, Mr. Bowling knew informer Hugh Morris, whereas Mr. Stallworth did not know him personally.

Concerning governmental action which leads to the unavailability or the destruction of evidence of possible exculpatory value to the accused, this Court in **United States v. Agurs**, 427 U.S. 97, 112-113 (1976) set forth the following standard for determining materiality:

> The proper standard of materiality must reflect our overriding concern with the justice of finding guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the addi-

> tional evidence is considered, there is no justification for a new trial. On the other hand if the verdict is of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.

Petitioner introduced evidence to prove that he was working for State Farm Mutual Automobile Insurance Company in the City of Dublin in middle Georgia at the time of the offense. He proved that he was employed at that time in 1958 at State Farm's office in Dublin and adjusted accident claims for them in a seventeen county area. Testimony was introduced showing that his duties included taking statements from witnesses to accidents and settling accident claims. Petitioner negotiated settlements and wrote checks as he was authorized to do by the company. (Tr. 312) He kept a daily record of his expenses including motel bills, gasoline and oil and each week sent them to his regional office for reimbursement. All such daily records that were submitted weekly were dated and would have shown the whereabouts of petitioner during June of 1958.

An official of State Farm testified that his company had destroyed all such employee records as needed by petitioner in 1972. (Tr. 294-302) These records which would have helped prove the innocence of petitioner, as well as that the State's two main witnesses, Tom Cook and C.S. Johnson, were testifying falsely against petitioner were destroyed by the company and unavailable to petitioner because of the pre-indictment delay of almost twenty years. In conflict with the Court's decisions in **United States v. Marion**, supra, **United States v. Valenzuela-Bernal**, supra, and in conflict with various U.S. Courts of Appeal and state courts of last resort, the

Alabama Court of Criminal Appeals simply brushed aside the strong evidence of prejudice occasioned by the delay. That court completely disregarded the importance of the unavailable and destroyed documentary evidence, the loss of which seriously prejudiced the defense of petitioner. That unavailable documentary evidence would have been admissible.

Petitioner submits that in order for the Alabama Court of Criminal Appeals to have found that he was not prejudiced by the delay, it would have been incumbent upon that court to assess and examine every single item of absent or lost testimony and documentary evidence enumerated above in order to determine each item's admissibility in an Alabama trial court. A cursory reading of its opinion shows that it did not engage in any such evidentiary analysis.

Given the highly circumstantial nature of the State's case against petitioner, the proposition also necessarily follows that if that court were to find any single item of his proffered evidence to be admissible, petitioner would have to be deemed to have shown prejudice resulting to him from the delay as a matter of law and his conviction would have to be reversed. The principles enunciated above set forth by this Court in **United States v. Agurs**, supra, and **United States v. Valenzuela-Bernal**, supra, allow no other result.

Since this is the only conviction of petitioner in his life and he had never been convicted of any offense before this (Tr. 342) and has never been convicted of any offense since, there was no reason for him to anticpate and prepare for an indictment returned in September, 1977 for an alleged offense committed in June of 1958, the decision of the lower court notwithstanding.

For all of the reasons set forth above, the decision of the Alabama Court of Criminal Appeals violates petitioner's due process rights as guaranteed by the Fourteenth Amendment and that decision conflicts with the decisions of this Court cited above and conflicts with decisions of various United States courts of appeal and state courts of last resort.

Accordingly, certiorari should be granted to review this substantial conflict between the Alabama Court of Criminal Appeals on the one hand and the several United States courts of appeal and various State courts on the other hand, so as to resolve all of these conflicts and so that this Court may examine all of the facets and aspects of pre-indictment delay that have been resolved by other courts but not by this Court. The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

II

Petitioner was indicted on September 26, 1977 for a crime that allegedly occurred on June 29, 1958 and the Alabama Court of Criminal Appeals ruled that his prosecution was not barred by Alabama's three year statute of limitations, but impliedly held that a person who committed the same crime since this Court outlawed the Alabama death penalty in the case of **FURMAN v. GEORGIA**, 408 U.S. 238 in 1972 could benefit from the statute of limitations. That decision by the Alabama Court of Criminal Appeals violated petitioner's right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner was charged with violating the provisions of Title 14, Section 123 of the Alabama Code of 1955 which has been carried forward into the Alabama Code of 1975 as Section 13-2-60 and is unchanged except that the death penalty provisions are deleted.

At the time of the alleged crime on June 29, 1958, the State of Alabama could have inflicted the death penalty upon petitioner for allegedly setting off explosives dangerously near an inhabited dwelling even though no one was killed. In this case, no one was killed. The State has not been able to impose the death penalty upon petitioner since this Court's decision in **FURMAN v. GEORGIA**, supra. Since 1972 there has been no death penalty for violating either the old or the new code section unless someone is killed. Since petitioner was not indicted for the 1958 bombing until September 26, 1977, he is entitled to the benefit of Alabama's three year statute of limitations as provided by Title 15, Section 221 of the Alabama Code of 1940 and Section 15-3-1 of the Alabama Code of 1975.

That the term "capital offense" is and has been a rather amorphous and changing category of crimes in Alabama, other than those specifically enumerated in the limitations statute such as murder, is evident from a cursory reading of the Alabama Supreme Court's decision in **BECK v. STATE**, 396 So. 2nd 645 (1980). Also obvious is the proposition that after this Court's ruling in **FURMAN v. GEORGIA**, 408 U.S. 238 (1972), capital felonies as such ceased to exist in Alabama. Such a result necessarily obtains because the Alabama appellate courts had heretofore ruled that no offense can be truly capital unless the death penalty can be imposed. **EX PARTE, McCRARY**, 22 Ala. 65, 72; **LEE v. STATE**, 13 So. 2nd 583

(Ala. App. 1943).

The Alabama Court of Criminal Appeals based its decision on a misunderstanding of **MANUCY v. WADSWORTH**, 293 So. 2nd 345 (Fla. 1974). The Supreme Court of Florida clarified its **MANUCY** opinion when it ruled in **REINO v. STATE**, Fla. 352 So. 2nd 853 (1977) and **REINO** fully supports petitioner's right to Alabama's three year statute of limitations. Since the Alabama Court of Criminal Appeals is relying on the Florida Supreme Court, it should not be in conflict with that court's ruling in **REINO v. STATE**, supra, which was presented in petitioner's brief to the Alabama courts. Rule 17 (b) of the Rules of this Court.

The Alabama Court of Criminal Appeals (Appendix, infra) says that the statue of limitations is a substantive right and remains the same, regardless of **FURMAN v. GEORGIA**, supra, and that petitioner cannot have the benefit of the three year statue of limitations, in conflict with the Reino case by the Florida Supreme Court. **REINO v. STATE**, supra, refers to **MANUCY v. WADSWORTH**, supra, at page 856 in light of **DONALDSON v. SACK**, 265 So. 2nd 499 (Fla. 1972) and beginning at page 857, **REINO v. STATE** says:

> [2] The compelling tenor of Donaldson is to the effect that all attributes of capital crimes, procedural or substantive, fall when and so long as the death penalty is abolished. The State maintains that although procedural changes such as those discussed in Donaldson follow from abolition of the death penalty, substantive matters such as the statue of limitations were not so affected. This assertion, however, is refuted by cases from jurisdictions which have considered

> the effect of abolition of the death penalty on the substantive question of entitlement to bail. This court was not presented with that issue in Donaldson because, as noted, the applicable constitutional and statutory provisions limited the right to bail for offenses punishable by life imprisonment as well as those punishable by death.

At page 858, **REINO** goes on to say:

> Hence, it is apparent that all incidents of capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptually inconsistent to conclude that the procedural advantages inuring to a defendant in a capital case fall with abolition of the death penalty and then conclude that the substantive disadvantages (limitations or entitlement to bail and unlimited statue of limitations) remain viable.

The Alabama Court of Criminal Appeals (Appendix, infra) said

> At the time appellant was indicted, Alabama's new dealth penalty provision was in effect and did not include appellant's alleged felony. Section 13-11-1 through 9, Code of Alabama 1975.

The Alabama Court of Criminal Appeals goes on to say that it agrees with the Florida Supreme Court and believes that the Florida Supreme Court in **MANUCY v. WADSWORTH**, supra, (1974) clearly and concisely addressed the issue. The Alabama court is in conflict with **MANUCY** and with **REINO v. STATE**, supra, a case that pointedly and clearly explains **MANUCY** to the effect that

petitioner is entitled to the benefit of the statute of limitations.

In addition to **REINO**, the better reasoned decisions which have dealt with this precise issue have held that a defendant who was being prosecuted under such circumstances as the petitioner should have the benefit of the statute that bars prosecution. **UNITED STATES v. PROVENZANO**, 423 F. Supp. 62 (S.D. of N.Y., 1976 **affirmed**, 556 F. 2nd 562 (2nd Circuit 1977); **UNITED STATES v. BROWN**, 422 A. 2nd 1281 (D.C. App. 1980). **PROVENZANO** especially fits petitioner's case.

Nevertheless, in deciding petitioner's case, the Alabama Court of Criminal Appeals is in conflict with the above cited cases by holding that the state has a perpetual right to prosecute petitioner for the criminal offense at issue since it was deemed to be a "capital offense" at the time that it was committed in 1958. Thus, petitioner is placed in the anomalous poistion of being subjected to everlasting criminal liability on account of this crime, whereas a similarly situated defendant who might be accused of having committed the same offense after the **FURMAN** decision would have the benefit of the three year statute of limitations against a tardy and stale prosecution of the matter. It is submitted that such an irrational and inexplicable distinction between petitioner and those people accused of having committed the same crime after the **FURMAN** decision in 1972 constitutes a denial to petitioner of due process and equal protection of the Alabama statue of limitations in criminal cases in contravention of the Fourteenth Amendment to the United States Constitution.

That statutes of limitation and their construction are subject to equal protection analysis is shown by two very

recent decisions of this Court, **MILLS v. HABLUETZEL**, 102 S. Ct. 1549 (1982); **G.D. SEARLE & CO. v. COHN**, 102 S. Ct. 1137 (1982). In **G.D. SEARLE & CO. v. COHN** at 1141-1142, this Court held that, at the very least, there must be a rational basis for a statute of limitations to delineate between cases of potential litigants. On the other hand, where more substantial personal interests are involved, such as the right to family identity and parental support, this Court has held that there must be a substantial relationship between the socially desirable ends sought to be acheived by a statute of limitations and the means, through the use of the statute, by which these goals are sought to be achieved. **MILLS v. HABLUETZEL** at 1555.

Given petitioner's fundamental, basic constitutional right to life and liberty, he argues that the state should be required to show a compelling interest in exempting his case from the statute of limitations provision before he can be deprived of its protection. No such interest or concern is enuciated in the decision of the Alabama Court of Criminal Appeals in which they have not only disregarded **PROVENZANO**, supra, but also a decision of the Florida Supreme Court in **MITCHELL v. STATE**, 25 So. 2nd 73 (1946) which illustrates that limitation of prosecution statutes are subject to equal protection analysis.

It is extremely doubtful that any reason can be cogenlty advanced for such disparate treatment of petitioner. Since anybody else charged with violating the same code section would be protected against prosecution by the statue of limitations, it would definitely deprive petitioner of equal protection of the law guaranteed by the Fourteenth Amendment to deny him the

benefit of the same statute.

Since the case of **FURMAN v. GEORGIA**, supra, (1972) declared the death penalty unconstitutional, petitioner should have the benefit of the three year statute beginning in 1958, or at the least, beginning in 1972 at the time of the **FURMAN** decision by this Court.

Accordingly, certiorari should be granted to review this substantial conflict wherein the Alabama decision conflicts with decisions of the Supreme Court of Florida, the United States Court of Appeals for the 2nd Circuit, and others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 10, 1982

CERTIFICATE OF SERVICE

This is to certify that upon the date stated above, I have served a true copy of the within and foregoing Petition for a Writ of Certiorari To The Alabama Court of Criminal Appeals and the Supreme Court of Alabama postage prepaid to opposing counsel by sending three copies to:

Honorable Charles E. Graddick
Attorney General of Alabama
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 63130

and the required number of copies to:

Mrs. Mollie Jordan
Clerk
Alabama Court of Criminal Appeals
445 Dexter Avenue
Montgomery, Alabama 36104

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